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THE EXAMINATION OF THE MEDICAL EXPERT*

PART II.

WHILE, as shown in the former part of this article, the hypothetical question must, under the present methods of trial, be largely used in the examination of the medical expert, yet, before ordinary jurors, it is far from being a satisfactory instrument. Every lawyer knows that through its use justice is not infrequently thwarted. It is a dangerous weapon in the hands of a skilled and unscrupulous examiner. If the object be to confuse and mislead, it offers him abundant opportunity. When so disposed, he may frequently keep within the rules as to form and content, and yet so manage his assumed facts as to impress the jurors, and at the same time obtain an expert opinion that may be conclusive with them though far from being justified by the real facts of the case as developed by the evidence as a whole. Yet if there be evidence to sustain the facts assumed, the result must stand. Even when honestly and conscientiously used, the hypothetical question frequently proves a source of confusion and doubt. In the first place, it is difficult for the ordinary juror to appreciate fully the attitude that he should maintain toward the facts assumed in the question. To be sure, he may learn, if the question is properly framed, that the facts assumed are to be deemed established only for the purposes of the question. But the qualification may not impress him, in many cases it undoubtedly does not impress him, and the frequent repetition of the question may bear the assumed facts in upon him in such a way that he erroneously treats them as proved and the opinion based upon them as a correct guide. Frequently, moreover, jurors do not understand their duty in regard to the

*Continued from 3 MICHIGAN LAW REVIEW, p. 540.

assumed facts until it is explained to them by the judge in his charge. If the facts assumed have been many and complicated, it may be difficult and perhaps impossible for them to determine from recollection to what extent they have been established. The result in many cases undoubtedly is that the easy course is taken of regarding assumed facts as proved and the opinion based thereon by an expert who has impressed them, as controlling. Further, the hypothetical question is often long and complicated, involving many facts, and is rendered still more difficult of comprehension by the use in it of technical terms. It is by no means unusual for jurors to lose sight of the real issue in their endeavor to reconcile the conflicting opinions of the experts based upon intricate assumptions of fact that are rendered more confusing by the use of technical language. In many cases the trial degenerates into a battle of the experts, wherein the personality and assurance of the witness become controlling factors. In the absence of any method whereby questions involving scientific deductions can be decided by a tribunal of experts, the improvement in our present methods rests largely with the trial judge, who should be constantly on the alert to see to it that the hypothetical question is not put to improper uses and that in its form and contents it is intelligible to ordinary men. Particularly important is it that jurors should be made to understand that before they act upon expert opinion, the basis of fact upon which the opinion rests, should be fully justified by the evidence.

The purpose of expert medical testimony is, in the majority of cases, to aid the jury in arriving at a correct conclusion as to the cause of a given condition. And it is a matter of importance for the examiner to understand as to the form in which the expert opinion should be given. This opinion usually involves the very issue that the jury are to determine, but the giving of it; in a case that is within the field of expert testimony, if properly done, is not regarded as an invasion of the function of the jury, for the reason that the subject-matter of the investigation is of such a nature that the jury must have scientific aid in order to reach a conclusion, and for the further reason that the jury are at liberty to reject an opinion that does not appeal to their judgment as being justified by the facts of the case. The expert opinion, so far as the jury are concerned, becomes a fact, to be considered in connection with all the testimony received, and to be acted upon or rejected as their judgment may dictate. This radical departure from the fundamental rule of evidence by which facts, as the term is commonly understood, must

be the subject-matter for the consideration of the jury, is justified by the necessity of the situation, and is safeguarded by the way in which the expert opinion, under proper instructions from the court, is to be used by the jury. "An exception," says the Supreme Court of Missouri, "is made to the general rule forbidding witnesses to give their opinions, and persons who by experience, observation, or knowledge, are peculiarly qualified to draw conclusions from such facts, are, for the purpose of aiding the jury, permitted to give their opinions. The exception is allowed from necessity. An expert witness in a manner discharges the functions of a juror, and his evidence should never be admitted unless it is clear that the jurors themselves are not capable, from want of experience or knowledge of the subject, to draw correct conclusions from the facts proved."⁷⁶

If, then, the subject-matter of the inquiry is one that calls for scientific explanation, the expert may give his opinion as to the cause of a particular result or condition. But courts have sometimes held that this cannot properly be a direct opinion as to what, in the judgment of the expert, was the cause of a given condition in the case upon trial, as by such a course the witness would invade the province of the jury. For example, in the case cited below, the defendant company was sued for negligently causing the death of the plaintiff's husband. Upon the trial, questions based upon what was assumed to have been the evidence in the case and embodying what purported to be a statement of all the facts testified to on the trial, and asking for an opinion as to the immediate cause of death, were propounded to medical experts. The exclusion of these questions upon the ground, among others, that the matter concerning which inquiry was made, was not, under the circumstances, the subject of expert evidence, but was the ultimate fact to be determined by the jury, was sustained by the Supreme Court. In the course of the opinion the court says: "It was entirely proper to inquire of these experts as to the probable effect of excitement or physical exertion upon one in deceased's diseased condition, but we never knew of a case, and have not been referred to any, where it was ever permitted to repeat to a witness all the evidence in the case, and then ask him what verdict, in his opinion, ought to be rendered in the case, which was, in effect, what was sought to be done in this instance."⁷⁷ The attitude of the court in the case cited

⁷⁶ *Benjamin v. Railway Co.*, 133 Mo. 289, 34 S. W. Rep. 593.

⁷⁷ *Briggs v. Minneapolis St. Ry. Co.*, 52 Minn. 36, 40, 53 N. W. Rep. 1019.

finds little support in the authorities. As will be seen, the same court in a subsequent case gives expression to very different views. Such an objection as was urged in this case should obtain when the opinion sought is upon a subject that is within the range of the information of ordinary jurors, but it ought not to prevail when the matter in controversy, if it is to be intelligently decided, calls for explanation from men who have given special study to the subject. Under such circumstances, the cause of a party's condition properly becomes the subject of expert testimony; it is a fact that jurors cannot safely determine without the aid of expert opinion. For example, whether a person is afflicted with a particular disease, and whether it was produced by certain injuries undoubtedly received by the party, would be peculiarly a matter for the opinion of the medical expert; it is not within the range of common knowledge. In the case of *Donnelly v. St. Paul City Ry. Co.*, an objection was interposed to a hypothetical question propounded to a medical expert, calling for his opinion as to the cause of a party's condition, upon the ground that the opinion called for was not of itself the subject of expert evidence. The question was based upon evidence as to the manner in which the party had been injured, as to the kind of injuries inflicted, and as to subsequent symptoms and present bodily condition. In sustaining the trial court in overruling the objection, the Supreme Court says: "It is laid down in the books that a question to an expert witness should not be so framed as to invade the province of the jury; but the line of cleavage between what does and what does not invade the province of the jury is not capable of definite location by any exact rule applicable to all cases, without regard to the subject of inquiry. The mere fact that the opinion called for covers the very issue which the jury will have to pass upon is not conclusive that it is not the proper subject of expert or opinion evidence. For example, sanity or insanity is the subject of expert testimony, although that may be the sole issue to be determined by the jury. Neither do we appreciate the fine distinctions sometimes sought to be drawn between asking an expert whether, in his opinion, certain causes might produce certain results, and asking him whether, in his opinion, they did produce such results. It is well settled that the opinions of medical experts as to the cause of death are admissible, such opinions being founded either upon the personal knowledge of the facts of the case, or upon a statement of the nature of the injury or symptoms and nature of the disease, as testified to by others. * * *

There can be no difference in principle between an opinion as to the cause of death and one as to the cause of physical ailments which

have not resulted in death."⁷⁸ This proposition is amply sustained by authority and particularly by the cases cited below.⁷⁹

But there are limitations and qualifications of this exception to the general rule of evidence, with which the examiner of expert witnesses should be familiar. In the first place, it should be remembered that questions calling for vague and speculative answers should be avoided. They tend to confusion and to the introduction of immaterial issues. The following have been held improper for the reasons suggested: "From your experience as a physician, what are the principal effects that will be apt to attend a patient who has suffered the injuries you have described? Can you state from your experience as a physician any of the effects which usually attend such injuries as you have testified to, and which are or may become permanent?" It will be noticed, says the court, "that neither of these questions is directed to the effect on the plaintiff of the injuries which she had sustained, but they are directed generally to the effect of such injuries on anybody and everybody who may have been unfortunate enough" to have met with a similar accident. And the court holds that the testimony called for would

⁷⁸ *Donnelly v. St. Paul City Ry. Co.*, 70 Minn. 278, 280, 281, 73 N. W. Rep. 157. In this case the earlier case of *Briggs v. Minneapolis St. Ry. Co.*, 52 Minn. 36, 53 N. W. Rep. 1019, is distinguished and limited, and it is suggested that "the writer of the opinion in that case probably used language which is too broad as a general proposition of law unless qualified or limited."

⁷⁹ *McClain v. Brooklyn City R. R. Co.*, 116 N. Y. 459, 468, 22 N. E. Rep. 1065; *Filer v. N. Y. Cent. R. R. Co.*, 49 N. Y. 42; *Stouter v. Manhattan Ry. Co.*, 127 N. Y. 661, 665, 666, 27 N. E. Rep. 805; *Turner v. Newburgh*, 109 N. Y. 308, 16 N. E. Rep. 344, 4 Am. St. Rep. 453. This last case the court distinguished from the *Strohm* case, 96 N. Y. 305, and the *Tozer* case, 105 N. Y. 617, in which evidence as to contingent and speculative consequences was excluded. *City of Decatur v. Fisher*, 63 Ill. 241; *Benjamin v. Holyoke St. Ry. Co.*, 160 Mass. 3; *Flaherty v. Powers*, 167 Mass. 61, 64, 44 N. E. Rep. 1074; *Commonwealth v. Mullins*, 2 Allen, 295; *United Railways v. Seymour*, 92 Md. 425, 48 Atl. 850; *Simon v. State*, 108 Ala. 27, 18 So. Rep. 731; *Louisville v. N. R. Co.*, — Ala. —, 29 So. Rep. 562; *State v. Chiles*, 44 S. C. 338, 22 S. E. Rep. 339; *Oliver v. C. N. & L. R. Co.*, 65 S. C. 1, 25, 26, 43 S. E. Rep. 307; *State v. Wright*, 134 Mo. 404, 35 S. W. Rep. 1145; *Smiley v. Ry. Co.*, 160 Mo. 639, 61 S. W. Rep. 667; *Wood v. Metropolitan St. Ry. Co.*, 181 Mo. 433, 81 S. W. Rep. 152; *Redman v. Metropolitan St. Ry. Co.*, — Mo. —, 84 S. W. Rep. 27. But it has been held in Missouri that where the defense in an action for personal injuries is that the condition of the plaintiff is the result of some other cause than the accident, it is error to permit medical experts to testify that they attribute plaintiff's condition to the accident. *Taylor v. Grand Ave. Ry. Co. (Mo.)*, 84 S. W. Rep. 873. See, further, in support of proposition in text *State v. Trippet*, 94 Iowa, 646, 649, 63 N. W. Rep. 445; *Donnelly v. St. Paul City Ry. Co.*, 70 Minn. 278, 280, 281, 73 N. W. Rep. 157; *Cooper v. St. Paul City Ry. Co.*, 54 Minn. 379, 382, 56 N. W. Rep. 42; *Tullis v. Rankin*, 6 N. Dak. 44, 68 N. W. Rep. 187, 35 L. R. A. 449; *Crouse v. Chi. & N. W. Ry. Co.*, 102 Wis. 196, 78 N. W. Rep. 446; *Selleck v. City of Janesville*, 100 Wis. 157, 162, 163, 75 N. W. 975; *Davey v. City of Janesville*, 111 Wis. 628, 633, 87 N. W. Rep. 813. But the opinion of an expert as to the cause of a given condition must have a substantial basis in fact. It cannot be based upon hearsay evidence. *Foster v. Fidelity & Casualty Co. of N. Y.*, 99 Wis. 447, 75 N. W. Rep. 69.

be purely speculative and for this reason improper.⁸⁰ While the expert witness may testify as to the future consequences of an injury, yet in order that he may properly do so, the apprehended consequences must be such as are reasonably certain to follow. He cannot testify as to consequences which are contingent, speculative or merely possible.⁸¹ But it has been held not improper, as calling for mere speculation, to ask a medical expert what injuries could have been inflicted by an accident described, that would not result in external evidences of their existence. There were no external appearances of injury, but the plaintiff claimed serious injuries and that he was suffering from them at the time of the trial. "The fact inquired about," says the court, "related to the present existence of injury, and not to what might have existed," and in this respect the case was distinguished from *Strohm v. New York, Lake Erie and Western R. R. Co.*⁸²

The expert opinion should be based upon facts and should be more than a mere impression. If an expert cannot speak with definiteness, his opinion should not be received, for, if admitted, it would serve simply to confuse and possibly to mislead.⁸³ But the courts do not go to the extreme of requiring the opinion of the expert to be unqualified. For example, a medical expert who was asked as to the probable course in the future of the disease from which plaintiff was suffering said, "I think he will never recover, so far as to be capable of any sort of persistent occupation," and it was held that the answer was not objectionable as being a speculative opinion based upon an opinion.⁸⁴ In the case cited below, it was held competent to ask the surgical expert who had attended the case and testified as to the character and nature of the injury, describing it as "a severe sprain," what results usually accompany or follow such an injury. "This was expert evidence," says the court, "based upon the knowledge and experience of the witness as a physician and surgeon and his knowledge of the particular case. It is not fairly to be regarded as speculative or conjectural. The defendant had ample opportunity to cross-examine the witness, and test the fairness of his evidence."⁸⁵

While the hypothetical question cannot properly call for an answer that would be purely speculative in character, it may call

⁸⁰ *Lewis v. Brooklyn Elevated R. R. Co.*, 7 Misc. Rep. (N. Y.) 286, 288.

⁸¹ *Strohm v. N. Y., Lake Erie & West. R. R. Co.*, 96 N. Y. 305; *Tozer v. N. Y. Cent. R. Co.*, 105 N. Y. 617.

⁸² *Louisville & N. R. Co. v. Sandlin*, 125 Ala. 585, 592, 28 So. Rep. 40.

⁸³ *Knights of Pythias v. Allen*, 104 Tenn. 623, 635, 58 S. W. Rep. 241.

⁸⁴ *Lehigh & H. R. Ry. Co. v. Marchant*, 28 C. C. A. 544, 84 Fed. Rep. 870.

⁸⁵ *Crites v. City of New Richmond*, 98 Wis. 55, 73 N. W. Rep. 322.

for the judgment of the expert as to probabilities. For example, if the hypothetical question embodies the symptoms and condition of the patient, as shown by the evidence, the medical expert may be asked what, in his judgment, is the probability of recovery. It is suggested by the court, in the case cited below, that an inquiry in this form amounts to no more than asking the witness his professional opinion as to whether the party would recover. "This was not an event," says the court, "the occurrence of which could be stated with absolute certainty. It was wholly a question of probabilities, and all that any honest witness, however skilful, could say would be that recovery was either probable or improbable."⁸⁶ "The contention of counsel," says the court in *Roark v. Greeno*, "that the physicians testifying should have been required to state with certainty the cause of plaintiff's condition after a hypothetical case had been submitted to them, would be supposing an exactness in medical science to which its most learned followers have not yet attained."⁸⁷ In further illustration, it may be suggested that it has been held proper for a medical expert to testify that a described condition of a party might have been produced by the accident;⁸⁸ that such expert, having examined the wound in question, may properly be asked to state from his experience and observation as a physician as to "the tendency or danger of that kind of a wound."⁸⁹ In the case cited below, it was held that an expert may, upon a proper hypothesis, be asked whether the injuries from which a party was suffering "were liable to be permanent." And in answer to the objection that the answer must necessarily be conjectural, the court said: "True, there can be no recovery, legitimately, for permanent impairment in a case like this in the absence of competent evidence warranting a conclusion, with reasonable certainty, that such impairment will exist as a result of the accident; but it is not necessary that opinion evidence should be confined to that high degree of certainty. Experts may properly testify to the mere probabilities of the case. * * * It would ordinarily be very difficult to secure any more definite opinion evidence than that from a conscientious expert."⁹⁰ The Supreme Court of Wisconsin has very properly said that "verdicts are not to be

⁸⁶ *Peterson v. Chicago, Mil. & St. Paul Ry. Co.*, 38 Minn. 511, 515, 39 N. W. Rep. 485. See, also, *Louisville, New Albany & Chicago Ry. Co. v. Wood*, 113 Ind. 544, 558, 14 N. E. Rep. 572, 16 N. E. Rep. 197; *Denver & R. G. R. Co. v. Roller*, 41 C. C. A. 22, 36, 37, 100 Fed. Rep. 738.

⁸⁷ *Roark v. Greeno*, 61 Kans. 299, 303, 304, 59 Pac. Rep. 655.

⁸⁸ *Werner v. Chicago & N. W. Ry. Co.*, 105 Wis. 300, 81 N. W. Rep. 416.

⁸⁹ *Rhinehart v. Whitehead*, 64 Wis. 42, 44, 45, 24 N. W. Rep. 401.

⁹⁰ *Hallum v. Village of Omro*, 122 Wis. —, 99 N. W. Rep. 1051.

based upon conjectural evidence."⁹¹ Yet the same court has held that it was not error to admit a physician's opinion "that it was *reasonably probable* that there would be no complete recovery."⁹² This court has also held that a physician may testify as to whether injuries are "likely" to result in recurrent troubles.⁹³ And where a physician had testified as to a party's injuries and condition, it was held not to be error to permit him to give his opinion as to what percentage of persons so suffering ultimately recover their health, the court considering that this "had a direct bearing upon the permanency of the disease, which it was claimed resulted from the injuries." It was also held, in the same case, that an expert might properly testify "as to how long a person under similar conditions would probably suffer and be unable to work."⁹⁴

The opinion of a medical expert as to the probable results of an injury may properly be asked either on direct or cross-examination. On cross-examination such an opinion may be sought for the purpose of testing the skill and professional knowledge of the witness.⁹⁵ But an expert who has testified as to the disease from which, in his opinion, a party is suffering, cannot upon cross-examination be asked whether other experts might not arrive at different conclusions. An expert cannot properly be called upon to express an opinion as to what the possible views of others may be, as the answer would necessarily be essentially speculative and could serve no useful purpose.⁹⁶

A proper foundation must always be laid for the opinion of the expert. The facts upon which his opinion is to be based, must always be before the jury, and they cannot, ordinarily, be in the form of hearsay statements. This being the rule, it has been held to be improper to ask a medical witness as to the exciting cause of a given condition, the only basis for the opinion, as disclosed by the evidence, being what was told to the witness when he first examined the injury and discovered the condition of the injured member about two weeks after the injury, it not even appearing what was then told him or as to the source of his information.⁹⁷ Further, it would be improper to ask a medical expert his opinion

⁹¹ *Viellesse v. City of Green Bay*, 110 Wis. 160, 85 N. W. Rep. 665.

⁹² *Block v. Milwaukee St. R. R. Co.*, 89 Wis. 371, 375, 61 N. W. Rep. 1101.

⁹³ *Tabor v. C. Reiss Coal Co.*, — Wis. —, 102 N. W. Rep. 1049.

⁹⁴ *Budd v. Salt Lake City Ry. Co.*, 23 Utah, 515, 65 Pac. Rep. 486.

⁹⁵ *Louisville, New Albany & Chicago Ry. Co. v. Lucas*, 119 Ind. 583, 592, 21 N. E. Rep. 986; *Norfolk Ry. & Light Co. v. Spratley*, 49 S. E. Rep. 502; *Filer v. N. Y. Cent. R. R. Co.*, 49 N. Y. 42, 45, 46; *T. W. & W. R. R. Co. v. Braddeley*, 54 Ill. 19, 5 Am. Rep. 71.

⁹⁶ *Root v. Boston Elevated Ry. Co.*, 183 Mass. 418; 67 N. E. Rep. 365.

⁹⁷ *Vosburg v. Putney*, 78 Wis. 84, 47 N. W. Rep. 99.

as to the permanency of injuries, his opinion to be based, among other things, upon an examination of the injured party and upon his declarations, when taken in connection with the fact that the party has a case pending in court for damages for the injuries sustained. A question in this form plainly leaves it to the expert to determine how far the statements of the injured party have been influenced by the fact that he has a case pending in court.⁹⁸ It is a general rule, having as its basis self-interest, that it is not competent for a physician to testify as to what the plaintiff in a case told him as to how the injury was received for which the suit is brought.⁹⁹ But it has been held that the medical expert may testify as to what an injured party said "in describing his feelings and detailing the nature and location of his pains and sufferings." As a reason for the holding, it is suggested by the court that the opinion of the physician "must necessarily be formed and guided by statements of the patient." It is proper and indeed necessary that the basis of the opinion appear.¹⁰⁰ It has, moreover, been held that the expert who has examined a party, not for treatment, but for the purpose of preparing himself for giving testimony in an approaching trial, may be asked as to statements made to him by the party in regard to his suffering which he attributes to the accident for which suit is brought, as such statements constitute a part at least of the grounds and reasons for the opinion of the expert. The court argues that while such self-serving statements made by a party to a pending suit would, if offered as original testimony, be excluded as hearsay of a particularly dangerous and objectionable type, yet they should be received when offered "as the grounds and reasons of an opinion given in evidence, or to be so given, by an expert."¹ In an earlier case the Massachusetts court expressed itself clearly upon this subject as follows: "The opinion of a surgeon or physician is necessarily formed in part on the statements of his patient, describing his condition and symptoms and the causes which have led to the injury or disease under which he appears to be suffering. The opinion is clearly competent as coming from an expert. But it is obvious that it would be unreasonable if not absurd to receive the opinion in evidence, and at the same time to shut out the reasons and grounds on which it was founded. Such a course of practice would take from the consideration of a court and jury the means of determining whether

⁹⁸ *International & G. N. R. Co. v. Goswick* (Texas), 85 S. W. Rep. 785.

⁹⁹ *Jones v. Village of Portland*, 88 Mich. 598, 50 N. W. Rep. 731.

¹⁰⁰ *City of Salem v. Webster*, 192 Ill. 369, 61 N. E. Rep. 323.

¹ *Cronin v. Fitchburg & Leominster St. Ry. Co.*, 181 Mass. 202, 63 N. E. Rep. 335.

the judgment of the expert was sound and his opinions well founded and satisfactory." To the suggestion of counsel for the defendant that the statements were made by the plaintiff after the commencement of the action, the court says: "We do not think that for this reason only they ought to have been rejected. It was a circumstance which may have detracted from the weight of the opinion of the physician, so far as it was founded on these statements. But as the statements were made to a medical man and for the purpose of receiving medical advice, they were competent and admissible."²

In explaining the grounds and reasons for his opinion, the expert may include in his testimony the details of experiments made by him, provided it appear that they were made under conditions and circumstances like those developed in the case.³ But if it does not so appear, testimony in regard to them should be excluded, as it would tend to confuse and mislead the jury.⁴ Where a physician has qualified as an expert he may base his opinion as to a given condition upon what has been revealed to him through scientific processes. The value of the opinion should, of course, depend upon what the jury find as to the accuracy and conclusiveness of the processes. For example, in the case cited below, a physician was permitted to exhibit to the jury an *x*-ray negative of an injured leg, taken by himself, and to testify "that in his opinion, based upon his examination made in this manner, the tibia of the leg had been fractured at a place a little below the knee joint." The negative was also admitted in evidence. In discussing the claim that the trial court erred in permitting the expert to testify as to his opinion, the reviewing court says: "It is argued that the witness, instead of being permitted to express the opinion that the bone of the leg had been fractured, should have been confined to explaining what appearances upon the negative indicated a fracture, and leave it for the jury to determine from the negative whether these appearances were there or not. But counsel, it would seem, have overlooked the fact that the witness qualified as a physician and surgeon, not only familiar with fractures, but with the *x*-ray process of determining whether a fracture had ever existed. As an expert, he was as much qualified to express his opinion from an examination made in this way as were the experts called by the appellant, who made their examinations by means more commonly used by the medical profession. The method of the examination did not

² *Barber v. Merriam*, 11 Allen (Mass.), 322, 324, 326.

³ *Eidt v. Cutler*, 127 Mass. 522.

⁴ *Commonwealth v. Piper*, 120 Mass. 185, 190.

affect the competency of his testimony. How much it affected its weight, was entirely a question for the jury."⁵

If the inquiry be as to the mental competency of a party, it is important that both counsel and expert should remember that the latter cannot properly give an opinion as to what constitutes capacity to perform a particular act, as, for example, to execute a will. What constitutes capacity is a question of law for the court. The jury, after having been advised by the court upon the subject, may say whether or not, in view of all the evidence, the party had the necessary capacity for the transaction in question. "The opinion of the expert must be limited to the estimate of the mental condition of the person concerning whom inquiry is made, and never allowed to be given as to the effect of that condition upon the particular transaction being investigated."⁶

Another question of practical importance is as to the extent to which scientific books may be used in the trial of a case that demands expert opinion. Various phases of the question have been considered by the courts of last resort. It is undoubtedly the general rule, established by the weight of authority as well as by reason, that such books, and particularly detached portions and selected passages therefrom, cannot be used before juries as evidence or for any purpose equivalent thereto. The reasons for the rule are such as to commend its soundness. The principal ones are the following: Scientific testimony, like other testimony, must be given under oath. It is needless to say that scientific books are not so written. Scientific testimony must be given with reference to the facts developed upon the trial in which it is offered; it must be based upon those facts. The opinions of the scientific book are for general application. Scientific or expert testimony should come from a witness who is in the presence of the jury for the purpose of examination and cross-examination as to his means of knowledge and as to his reasons for the faith that is in him. There is, of course, no way by which the author of the scientific treatise, if not a witness in the case, can be cross-examined, and frequently it would not be possible to determine as to his means of knowledge. It is the duty of the expert in giving his testimony to do so in such a way that the ordinary jurymen can understand the significance and scientific bearing of the facts developed upon the trial. But the scientific book is not addressed to untrained readers. The author writes for

⁵ *Miller v. Dumon*, 24 Wash. 648, 651, 652, 64 Pac. Rep. 804.

⁶ *Marshall v. Hanby*, 115 Iowa 318, 88 N. W. Rep. 801; *Furlong v. Carraher*, 108 Iowa, 492, 79 N. W. Rep. 277; *Betts v. Betts*, 113 Iowa 111, 84 N. W. Rep. 975; *Kempsey v. McGinnis*, 21 Mich. 123, 143-146; *Fairchild v. Bascomb*, 35 Vt. 398, 416, 417; *Schneider v. Manning*, 121 Ill. 376, 386.

trained readers who are fitted to understand scientific terms and to recognize and appreciate the meaning and proper application of scientific conclusions. Furthermore, the new discoveries in science, particularly in the science of medicine, are constantly bringing about a change of view, so that through the use of books a deduction entirely erroneous, according to the most recent consensus of opinion, might become a controlling factor in the case. The medical work, for example, that was a standard authority last year may, through new discoveries, be obsolete this year. Scientific works, moreover, are often speculative, and sometimes they are mere compilations, without any real authority. "Every medical and scientific writer," says Justice CAMPBELL in *People v. Millard*, cited *infra*, "bases much of his conclusions upon what he believes to be true in the reported facts and opinions of other men of science. Those facts may be correctly stated, or they may be assumed on small or no foundation. Those opinions may be taken carelessly at second hand, or they may have been thoroughly weighed before adoption. No one can tell whether a medical book or opinion is reliable or not until he has applied himself with some fitting preparation to its study and criticism. The book may be good in part and bad in part, and neither court nor jury can presumptively ascertain its quality." And, lastly, there would be no end to the reading of books if it were once allowed, and cases would be tried and decided, not upon the sworn testimony of witnesses, but upon the unsworn publications of scientific authors. The foregoing and other reasons for the general rule will be found elaborated in the cases cited in the note.⁷

But in a limited number of jurisdictions this general rule is not

⁷ *Huffman v. Click*, 77 N. Car. 55; *Melvin v. Easley*, 1 Jones Law (N. Car.) 386, 62 Am. Dec. 171; *People v. Hall*, 48 Mich. 482, 490, 12 N. W. Rep. 665; *Marshall v. Brown*, 50 Mich. 148, 15 N. W. Rep. 55; *People v. Millard*, 53 Mich. 63, 77, 18 N. W. Rep. 562; *People v. Vanderhoof*, 71 Mich. 158, 179; *Fox v. Peninsular White Lead & Color Works*, 84 Mich. 676, 48 N. W. Rep. 203; *Hall v. Murdock*, 114 Mich. 233, 72 N. W. Rep. 150; *Ashworth v. Kittridge*, 12 Cush. 193; *Commonwealth v. Wilson*, 1 Gray 337; *Washburn v. Cuddihy*, 8 Gray 430; *Commonwealth v. Sturtivant*, 117 Mass. 122, 139; *Commonwealth v. Brown*, 121 Mass. 69, 81; *Johnston v. Richmond & D. R. Co.*, 95 Ga. 685, 687, 688, 22 S. E. Rep. 694; *Quattlebaum v. State*, 119 Ga. 433, 435, 46 S. E. Rep. 677; *Davis v. State*, 38 Md. 15, 36, 37; *North Chicago Roll. M. Co. v. Monka*, 107 Ill. 340, 344; *People v. Wheeler*, 60 Cal. 581; *Gallagher v. Market St. Ry. Co.*, 67 Cal. 13, 6 Pac. Rep. 869, 56 Am. Rep. 713; *Tucker v. Donald*, 60 Miss. 460, 469, 470, 45 Am. Rep. 416; *Bixby v. Omaha and C. B. Ry. and Bridge Co.*, 105 Iowa, 293, 75 N. W. Rep. 182; *Stewart v. Equitable Mut. Life Ass'n of Waterloo*, 110 Iowa 528, 81 N. W. Rep. 782; *Union Pac. Ry. Co. v. Gates*, 25 C. C. A. 103, 79 Fed. 584; *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. Rep. 295; *Brady v. Shirley*, 14 S. Dak. 447, 85 N. W. Rep. 1002; *Stilling v. Town of Thorp*, 54 Wis. 528, 11 N. W. Rep. 906, 41 Am. Rep. 60; *Boyle v. State*, 57 Wis. 472, 15 N. W. Rep. 827, 46 Am. Rep. 41. "Scientific men are permitted to give their opinions as experts, because given under oath, but the books which they write containing them are, for want of such oath, excluded." *State v. O'Brien*, 7 R. I. 336, 339.

recognized, or, if recognized, is limited and qualified in its application. The Supreme Court of Alabama, for example, holds distinctly that "medical authors, whose books are admitted or proven to be standard works with that profession, ought to be received in evidence." And in commenting upon the subject the court says: "Should such works be obscure to the uninitiated, or should they contain technicalities, or phrases not understood by the common public, proper explanation should be offered, lest the jury be thereby misled. * * * * The opinions of physicians as experts touching disease and the science of medicine, are, under all the authorities, admissible in evidence. If we lay down a rule which will exclude from the jury all evidence on questions of science and art, except to the extent that the witness has himself *discovered* or *demonstrated* the correctness of what he testifies to, we certainly restrict the inquiry to very narrow limits. The brief period of human life will not allow one man, from actual observation and experience, to acquire a complete knowledge of the human system and its diseases. Professional knowledge is, in a great degree, derived from the books of the particular profession. In every step the practitioner takes, he is, perhaps, somewhat guided by the opinions of his predecessors. His own scientific knowledge is, from the necessities of the case, materially formed and moulded by the experience and learning of others. Indeed much of the knowledge we have upon all subjects, except objects of the sense, is derived from books and our association with men. * * * * Are opinions derived from the perusal of books and deposed to by witnesses safer guides for that body (the jury) than the books themselves are?"⁸ The Supreme Court of Iowa in an early case reached the same conclusion. "On the whole," says this court, "we think it the safest rule to admit standard medical books as evidence of the author's opinions upon questions of medical skill or practice involved in a trial. This rule appears to us the most accordant with well established principles of evidence."⁹ But in a subsequent and comparatively recent case,¹⁰ the Iowa court announces the general rule

⁸ *Stondenmeier v. Williamson*, 29 Ala. 558, 567; *Merkle v. State*, 37 Ala. 139; *Bales v. State*, 63 Ala. 38.

⁹ *Bowman v. Woods*, 1 Greene (Iowa) 441, 444, 445. The correctness of this practice is apparently recognized in *State v. Gillick*, 10 Iowa, 98, although it is held in this case that it is not error to refuse to permit the jury to take with them to the jury room the book from which passages have been read in evidence, such passages not being marked. And in the later case of *Quackenbush v. The Chicago & Northwestern Ry. Co.*, 73 Iowa, 458, 462, 35 N. W. Rep. 523, the attitude of the court in regard to the question seemingly remains the same. See, also, *State v. Winter*, 72 Iowa 627, 34 N. W. Rep. 475.

¹⁰ *Bixby v. Omaha & Council Bluff Ry. and Bridge Co.*, 105 Iowa, 293, 75 N. W. Rep. 182.

above given as, in its opinion, embodying the sound doctrine. "We think," says the court, "the safer practice is to rely upon the testimony of living witnesses of the medical profession, who may bring the learning and resarch of the books within the comprehension of the jurors and the truths of science to the facts in each particular case."¹¹ According to an early Wisconsin case it is within the discretion of the trial court to permit or to refuse to permit the reading upon the trial of medical works; but the court suggests that "an extreme case may be supposed, in which the discretion of the judge, both in the admission and exclusion of books might be so abused as to require correcting."¹² In recent cases, however, the Wisconsin court adheres strictly to the general rule of exclusion.¹³

In a recent work on evidence, the learned author, while recognizing the decided weight of authority to be in favor of the rule excluding learned treatises as evidence, yet contends that such treatises should, upon principle, be received in evidence, their use being regulated by the court in such a way as to guard against the abuse of the privilege and to exclude works not worthy of trust. Under the head of the trustworthiness of such evidence, this author says: "The writer of a learned treatise publishes primarily for his profession. He knows that every conclusion will be subjected to careful professional criticism, and is open ultimately to certain refutation if not well founded; that his reputation depends on the correctness of his data and the validity of his conclusions; and that he might better not have written than put forth statements in which may be detected a lack of sincerity of methods and of accuracy of results. The motive, in other words, is precisely the same in character and is more certain in its influence than that which is accepted as sufficient in some of the other hearsay exceptions, namely, the unwelcome probability of a detection and exposure of errors. Finally, the guarantees of accuracy, such as they are, at least are greater than those which accompany the testimony of so many expert witnesses on the stand. * * * * It must be admitted that those who write with no view to litigation are at least as trustworthy, though unsworn and unexamined, as perhaps the greater portion of those who take the stand for a fee from one of the litigants."¹⁴ While the foregoing and other views of this learned writer upon the question are entitled to respect and consideration,

¹¹ See, also, *Stewart v. Equitable Mut. Life Ass'n of Waterloo*, 110 Iowa, 528, 530.

¹² *Luning v. State*, 1 Chand. 264, 2 Pin. 284. See, also, *State v. West*, Houst. Crim. Rep. (Del.) 371 398, 399.

¹³ See, *Stilling v. Town of Thorp*, 54 Wis. 528, 11 N. W. Rep. 906, 41 Am. Rep. 60; *Boyle v. State*, 57 Wis. 472, 15 N. W. Rep. 827, 46 Am. Rep. 41.

¹⁴ III Wigmore on Evidence, § 1692.

it will be apparent to the practical lawyer and the trial judge that he fails to appreciate the dangers that would follow the extended use in evidence of statements made out of court by a person not under oath and not subjected to cross-examination and made, moreover, for learned readers and not in view of any particular state of facts. If the variety of scientific opinion as disclosed in learned treatises were to be placed before juries in addition to the conflicting statements of the sworn experts, the result would be little less than paralyzing.

The general rule excluding medical books cannot be evaded by indirection, as, for example, by counsel reading from standard works upon a given subject and then asking the expert if what is read corresponds with his judgment. The effect of a proceeding of this kind would be the same as would result from a direct reading of the books to the jury, and the purpose of the examiner would undoubtedly be to produce thereby the same effect. Such being the case, it is apparent that the fundamental objections to this kind of evidence should apply.¹⁵ In the cases cited, the books were used as described during the examination in chief of the expert. But it has been held not competent to pursue such a course upon cross-examination, when it is apparent that the real object of the counsel in so doing is to get before the jury extracts from the books as original evidence to sustain his theory of the case. In passing upon this phase of the question the Supreme Court of Illinois says: "Where a witness simply gives his opinion as to the proper treatment of a given disease or injury, and a book is produced recommending a different treatment, at most the repugnance is not of fact, but of theory; and any number of additional books expressing different theories would obviously be quite as competent as the first. But since the books are not admissible as original evidence in such cases, it must follow that they are not admissible on cross-examination, where their introduction is not for the direct contradiction of something asserted by the witness, but simply to prove a contrary theory."¹⁶ It is assumed in the foregoing statements regarding the improper use of books upon cross-examination, that the expert has not in his examination in chief referred to any books as the authority for his opinion. Under such circumstances, the use of books upon cross-examination as indicated, would not serve in any way to discredit the witness, but would serve simply to inform the jury of the opinion of the author, and to set up that opinion against

¹⁵ *Lilly v. Parkinson*, 91 Cal. 655, 656, 27 Pac. Rep. 1091; *Pohl v. Troy City Ry. Co.*, 81 App. Div. N. Y. Sup. Ct. 308.

¹⁶ *City of Bloomington v. Shrock*, 110 Ill. 219, 222, 223, 51 Am. Rep. 679; *Marshall v. Brown*, 50 Mich. 148, 150.

the opinion of the witness. This would be a clear evasion of the rule against the use of books of science as evidence.¹⁷ But it has been held to be a proper method of cross-examination for counsel to ask the expert, for the purpose of testing his learning, whether certain statements were not made by writers upon the subject under investigation, the writers being named, and the statements to which reference is made, being read from books as a part of the examination.¹⁸

When an expert assumes to base his opinion upon particular authorities, extracts from these authorities may be read to the jury, for the purpose of discrediting his testimony. Such a resort to scientific books is not improper, as the extracts are read, not for the purpose of proving the facts therein contained, but for the purpose of disparaging the opinion of the witness and preventing the jury from being misled by his false assumptions.¹⁹ Further, when a medical expert has testified that he has read text-books of authority upon the subject under investigation, in order that he might be able to state why he diagnosed the case as he did, paragraphs from standard authors upon the subject may be read to him, and he may be asked whether or not he agrees with such authors, this course being considered a proper one for testing the knowledge of the witness. This, the court suggests, in the case cited below, is in no just sense the reading of medical books to the jury or the reading of such books for the purpose of contradicting the witness. But this court also suggests that "great care should always be taken by the court to confine such cross-examination within reasonable limits, and to see that the quotations read to the witness are so fairly selected as to present the author's views on the subject of the examination."²⁰ In the cross-examination of the medical expert, he may be asked as to the extent of his knowledge and as to his familiarity with standard authors. And if he states that his testimony is based upon medical authorities and not upon his personal experience, he may be asked to state what the medical authorities hold upon the question. This course of cross-examination would be proper as a means of informing the jury as to the value of the expert's opinion. "For the purpose of testing his recollection as

¹⁷ *Butler v. S. C. & G. Extension R. R. Co.*, 130 N. C. 15, 40 S. E. Rep. 77.

¹⁸ *Clukey v. Seattle Electric Co.*, 27 Wash. 70, 75, 76, 67 Pac. 379; *Louisville, N. A. & C. Ry. Co. v. Howell*, 147 Ind. 266, 45 N. E. Rep. 584; *Hess v. Lowrey*, 122 Ind. 225, 233, 23 N. E. Rep. 156; *State v. Wood*, 53 N. H. 484, 494, 495; *State v. Eichberg*, 105 Tenn. 333, 351, 352, 59 S. W. Rep. 1020; *Hutchinson v. State*, 19 Neb. 262, 268, 269, 27 N. W. Rep. 113.

¹⁹ *Pinney v. Cahill*, 48 Mich. 584; *City of Ripon v. Bristol*, 30 Wis. 614; *Huffman v. Click*, 77 N. C. 55, 58, 59; *Cronk v. Wabash R. Co.*, 123 Iowa, 349, 351, 98 N. W. Rep. 884.

²⁰ *Conn. Mut. Life Ins. Co. v. Ellis*, 89 Ill. 516, 519.

well as his knowledge," says the court, "it was proper to interrogate him as to the teachings of those authorities, and in case his testimony was incorrect to confront him with them in order that he might be corrected and the jury thus be rendered able to judge of the weight to which his testimony was entitled." Indeed, it is suggested by the court that if the witness had been testifying from his experience and observation, a similar course in cross-examination would have been proper for the purpose of ascertaining his means of knowledge.²¹ Furthermore, it has been held that when a medical expert in his examination in chief has described an injury which in his opinion a party has sustained, and, in response to questions, has given the accepted method of treatment, as laid down by the medical authorities, he may, on cross-examination, be referred to a medical work, admitted by him to be a standard authority, and asked if the treatment, as laid down by that authority is not different from the treatment that he has described. Such reference to a medical authority on cross-examination is not objectionable, as its purpose is simply to test the learning and accuracy of the witness.²² But in the application of these exceptions, the general rule must be kept in mind, namely, that treatises cannot ordinarily be read in evidence for the purpose of contradicting the expert.²³

The medical expert cannot properly be asked what a standard authority says upon the subject under investigation. If the authority itself cannot be read in evidence, the witness should not be permitted to give from memory extracts from it as evidence.²⁴ And to ask a medical witness to name the circumstances of cases that he has read upon the subject of his testimony would be objectionable, as it would be simply an indirect method of introducing medical works in evidence.²⁵ It has been held, though in an inferior jurisdiction, that an expert cannot properly read from his own publications in support of his testimony. "We think it was error," says the court, "to allow this witness to read from his own published works to support his own testimony, just as it would have been to allow him to read from any other author, even if approved and accepted authority. What he had written abstractly could not be made testimony."²⁶ But it may be suggested that it would not, upon principle, be a violation of the general rule against the read-

²¹ *Hutchinson v. State*, 19 Neb. 262, 268, 269.

²² *Wittenberg v. Onsgard*, 78 Minn. 342, 81 N. W. Rep. 14.

²³ *City of Bloomington v. Shrock*, 110 Ill. 219, 221, 222, 51 Am. Rep. 679; *Davis v. State*, 38 Md. 15, 36, 37; *State v. O'Brien*, 7 R. I. 336; *Mitchell v. Leach*, 69 S. C. 413, 422, 48 S. E. Rep. 290; *Hall v. Murdock*, 114 Mich. 233, 239, 72 N. W. Rep. 150.

²⁴ *Boyle v. State*, 57 Wis. 472, 478, 479, 15 N. W. Rep. 827, 46 Am. Rep. 41; *Faily v. Krentzmann*, 141 Cal. 519, 75 Pac. Rep. 104.

²⁵ *People v. Goldenson*, 76 Cal. 328, 348, 19 Pac. 161.

²⁶ *Mix v. Staples*, 17 N. Y. Supp. 775.

ing of medical works in evidence, to permit an author, when upon the stand as an expert, to adopt his published statements as his present opinion applied to the facts upon which his opinion is sought. In the case last cited O'BRIEN, J., says: "I think a distinction is to be made between reading by an expert from a work of his own and a work of some other author. In one case he is expressing his opinion, which has been reduced to writing or printed; in the other, he is supporting his views by what others may have written on the subject, which latter is clearly incompetent and improper."²⁷

Under a statutory provision which makes "historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties * * * * *prima facie* evidence of facts of general notoriety and interest," it has been held that medical books are not properly admissible. The expression "facts of general notoriety and interest" has been held to refer to "facts of a public nature, either at home or abroad, not existing in the memory of men, as contradistinguished from facts of a private nature existing within the knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts," says the court, "including historical facts, facts of the exact sciences, and of literature or art, when relevant to a cause, that, under the provisions of the code, proof may be made by the production of books of standard authority. * * * Such facts include the meaning of words and allusions, which may be proved by ordinary dictionaries and authenticated books of general literary history, and facts in the exact sciences founded upon conclusions reached from certain and constant data by processes too intricate to be elucidated by witnesses when on examination. * * * But medicine is not considered as one of the exact sciences. It is of that character of inductive sciences which are based on data which each successive year may correct and expand, so that what was considered a sound induction last year may be considered an unsound one this year, and the very book which evidences the induction, if it does not become obsolete, may be altered in material features from edition to edition, so that we cannot tell, in citing from even a living author, whether what we read is not something that this very author now rejects."²⁸

²⁷ O'Brien, J., in *Mix v. Staples*, 17 N. Y. Supp. 775, 776.

²⁸ *Gallagher v. Market St. Ry. Co.*, 67 Cal. 13, 15, 16, 6 Pac. 869. See, also, *Union Pac. Ry. Co. v. Bates*, 25 C. C. A. 103, 79 Fed. 584. Similar statutes are to be found in Idaho, Rev. St. 1887, § 5990; Montana, Code Civ. Pro. 1895, § 3227; Nebraska, Comp. Stat. 1899, § 5916; Oregon, Code Civ. Pro. 1892, § 758; Utah, Rev. Stat. 1898, § 3400, and Iowa, Code 1897, § 4618. The Iowa Supreme Court now follows the Supreme Court of California in its interpretation of this statute and excludes medical works. *Bixby v. Railway and Bridge Co.*, 105 Ia. 293, 75 N. W. Rep. 182. And the same is true of the Supreme Court of Nebraska. *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. Rep. 295.

May an attorney, after having obtained the opinion of his expert upon a particular subject and a statement from him that a designated work upon the subject is standard, read from that work to the jury as a part of his argument in the case? The authorities are not entirely in harmony upon the question, but the decided preponderance is against such a proceeding. It is apparent that this is an indirect way of using the work for evidential purposes; it is, in effect, the reading of the work as evidence. The ordinary procedure and its effect when allowed is well described by the Supreme Court of North Carolina: "It sounds plausible to say, you do not read it as evidence, but that you read and adopt it as a part of your argument. But in so doing the counsel really obtains from it all the benefits of substantive evidence fortified by its 'standard' character. He first proves by the medical expert that the work is one of high character and authority in the profession, and then he says to the jury, 'here is a book of high standing, written by one who has devoted his talents to the study and explanation of this special subject of nervous diseases. He expresses my views with so much more force than I can, that I will read an extract from his work and adopt it as a part of my argument.' It is evident that the effect of this manoeuvre is to corroborate the testimony of the medical expert or other witnesses by the authority of a great name testifying, but not under oath, to the same thing as the expert, but with this difference, that the author has not heard the evidence upon which the expert based his opinion."²⁹ But in Connecticut it has been held, two of the five judges dissenting, that a long practice in that state has established a rule permitting counsel for the accused to read to the jury from standard medical works that bear upon the case.³⁰ And in Missouri it is apparently within the discretion of the court to allow the reading by counsel in argument of medical works, but the Supreme Court has distinctly stated that the privilege cannot be exercised as a matter of right.³¹ In Illinois and in Kansas, extracts from learned treatises may, perhaps, be used in argument for purposes of illustration, but if so used, the court should always instruct the jury that the extracts read are not evidence but the theories simply of medical men, used by counsel simply for the purposes of illustration and argument.³²

²⁹ *Huffman v. Click*, 77 N. C. 55, 58. See, also, *Quattlebaum v. State*, 119 Ga. 433, 435, 46 S. E. Rep. 677; *People v. Wheeler*, 60 Cal. 581; *Boyle v. State*, 57 Wis. 472, 15 N. W. Rep. 827, 46 Am. Rep. 41; *State v. Rogers*, 112 N. C. 874, 877, 878, 171 S. E. Rep. 297; *Regina v. Taylor*, 13 Cox Cr. Cases, 77.

³⁰ *State v. Hoyt*, 46 Conn. 330, 337, 338.

³¹ *State v. Soper*, 148 Mo. 217, 235, 236, 49 S. W. Rep. 1007.

³² *Yoe v. People*, 49 Ill. 410, 412; *State v. O'Neil*, 51 Kans. 651, 654, 33 Pac. 287.

There would seem to be no objection to an attorney's reading questions to a medical expert from a standard medical authority, if he does so in order that his questions may be correct from the scientific point of view and clearly intelligible to the witness. In passing upon this subject the Supreme Court of Connecticut says: "If a question is in itself proper in form and relevant to the issue, it is not of the slightest consequence how it was suggested to the mind of the interrogating counsel, and whether it was read from a book or drawn from the storehouse of memory and whether it had reposed in the memory five minutes or five years would seem equally immaterial."³³ In this case, after objection made to the reading of the questions, the attorney repeated them from memory. It has also been held not to be improper to allow counsel to incorporate into his questions quotations from medical works when questioning experts as to their technical knowledge.³⁴

A reading of the cases upon the subject of expert testimony must reveal the fact that the criticisms of the courts upon it are justified, not on account of any inherent danger in such testimony or because of its necessarily unsatisfactory character, but rather because of the frequent failure of counsel to conduct the examination of experts in accordance with the rules governing the admission of opinion evidence and a lack of appreciation, or, at all events, a forgetfulness, in many cases, by both counsel and expert that the function of the latter is quasi-judicial. In his enthusiasm for his client, the trial lawyer steps beyond the bounds, and he finds a ready second in his expert who has become imbued with the spirit of the advocate. The result is error which prompts caustic comments by the reviewing court, not always upon the course of counsel or the attitude of the witness, but frequently upon the general worthlessness and danger of expert testimony. That within his proper field the expert is a necessary factor in the administration of justice, cannot admit of doubt. In many cases, without his aid, courts and juries would be helpless. That expert testimony, if the case demands it, and it is properly and logically developed, is safe and helpful, is the verdict of reason and experience. In the absence of a reform that would make the expert the appointed officer of the court, instead of the paid employé of a party, he can escape disparagement only through the care of counsel in the conducting of the examination and his own care in preserving the judicial attitude.

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³³ *Tompkins v. West*, 56 Conn. 478, 485.

³⁴ *Williams v. Nally*, Ky., 45 S. W. Rep. 874.